

NOT DESIGNATED FOR PUBLICATION
ARKANSAS COURT OF APPEALS
D.P. MARSHALL JR., Judge

DIVISION I

CA06-431

21 February 2007

CLIFFORD BRADY and
MARY ANN BRADY
APPELLANTS

AN APPEAL FROM THE
PULASKI COUNTY CIRCUIT
[CV 03-11611]

v.
WILLIAM W. PERDUE and
GAYNOR C. PERDUE
APPELLEES

HONORABLE CHRISTOPHER
CHARLES PIAZZA, JUDGE

AFFIRMED

D.P. MARSHALL JR., Judge

The circuit court held that the Perdues were entitled to a prescriptive easement in a private road and granted summary judgment to them. This disposition is unusual because whether a prescriptive easement exists is a question of fact. *Carson v. County of Drew*, 354 Ark. 621, 626, 128 S.W.3d 423, 426 (2003). We affirm nonetheless. The record contains undisputed testimony from Mr. Brady that, beginning no later than 1994, he objected to the Perdues' tenants' use of the disputed

road but the tenants continued using it until 2003. We hold that this undisputed and adverse use for more than seven years after Mr. Brady first objected ripened into a prescriptive easement.

The Bradys and the Perdues own adjoining parcels of land. In 1984, the Bradys conveyed an easement for a ten-foot road across their land to the Perdues' predecessors in title, the Bargers. The Perdues bought their land from the Bargers in 1992. In their eventual lawsuit, the Perdues sought continued use of the road based on alternative legal theories: the easement the Bradys had granted to the Bargers, and an easement by prescription.

The material facts on the first theory were disputed, but the material facts on the second theory were not. Mr. Brady testified in his deposition that, in 1993 or 1994, he approached the Perdues' property manager and objected to the Perdues' tenants' continued use of the roadway. Mr. Brady testified further that, despite his objection, he knew that the Perdues' tenants and their guests continued to use the road until at least 2003, when he blocked the road with a steel post. Mr. Brady also testified that he objected to the Perdues' various property managers at other times after 1994 and told them that he was going to fence off the road. But he did not follow through on his plan until 2003.

When a person uses a passageway over land, whether by permission or

otherwise, if the use continues openly for seven years after the landowner has actual knowledge that the use is adverse to his interests, or the use continues for seven years after the facts and circumstances are such that the law presumes the landowner knows the use has become adverse, then the use ripens into a prescriptive easement. *Gazaway v. Pugh*, 69 Ark. App. 297, 302, 12 S.W.3d 662, 666 (2000). The only contested issue here is the adversity of the use by the Perdues and their tenants.

The Bradys argue that Mr. Perdue did not have the requisite intent to establish a prescriptive easement because he thought this road was a public road. In this case, however, Mr. Perdue's intent is not dispositive. Arkansas law recognizes that other factors, including the length of time and the circumstances under which a roadway is used, may be sufficient to establish adverse use. *Zunamon v. Jones*, 271 Ark. 789, 791, 610 S.W.2d 286, 288 (Ark. App. 1981).

The Perdues established that their use of the road continued openly for more than seven years after Mr. Brady knew that their use was adverse to his interests. *Carson, supra*. The Perdues thus made a prima facie case for summary judgment. The Bradys offered no proof in response to create a genuine issue of material fact about the adversity of the Perdues' continued use. Because the Bradys failed to meet proof with proof on this dispositive issue, we hold that the circuit court correctly granted summary judgment to the Perdues. *Bishop v. City of Fayetteville*, 81 Ark.

App. 1, 7, 97 S.W.3d 913, 918 (2003).

Affirmed.

GRIFFEN AND HEFFLEY, JJ., agree.